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No._____

In The

Supreme Court of the United States

October Term, 1966

D. R. SMALLEY & SONS, INC., Petitioner

V.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

D. R. Smalley & Sons, Inc., Petitioner, prays that a Writ of Certiorari issue to Review Order of the United States Court of Claims entered in the above entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims is printed in the Appendix A hereto, infra page 1a.

JURISDICTION

The final order of the United States Court of Claims (Appendix A) is dated February 17, 1967.

The jurisdiction of the Court is invoked under 28 United States Code 1255 (1).

QUESTIONS PRESENTED

1. Does Title 23 United State Code direct the Department of Commerce to obligate Federal funds through the State of Ohio specifically for the benefit of contractors who construct the Federal-Aid Highways, so as to allow a contractor to recover those funds as against the United States once such funds have been earned?

2. Does the language of Title 23 United States Code and the facts herein involved create an agency, with the individual state highway departments as agents for the Federal Bureau of Public Roads so as to obligate the United States to pay its proportional share of the cost of construction, as principal, to the contractor who constructs the Federal-Aid Highways therein contemplated?

3. Does the purpose and the control expressed in Title 23 United States Code constitute an Act of Congress such as to imply an obligation of the United States Government to pay just compensation to contractors for the construction of the Federal-Aid Highways?

4. Did the Congress, through its power to regulate Commerce and its authority to provide for the National Defense, take petitioner's property for a public use so as to obligate the United States to provide just compensation under the Fifth Amendment to the Constitution of the United States?

5. Did the Court of Claims err in dismissing Petitioner's Petition (considering the serious import of the questions presented and their public nature) on summary motion?

6. Was the action on the part of the United States Government such action as to fall within the sovereign immunity doctrine concerning acts of the United States Government? If so, do the provisions of Title 28 United States Code Section 1491, specifying the jurisdiction of the Court of Claims, operate as a waiver of this immunity so as to allow petitioner his day in court concerning the claims involved?

CONSTITUTIONAL PROVISIONS, STATUTES, and COURT RULES INVOLVED

1. Article V of the Amendments to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Rule 20(b), pg 17 1964 Revised Rules of the United States Court of Claims;

"Every defense, in law, or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of a provided in Rule 64, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 64."

3. Rule 64(b) (d) pg 77, 1964 Revised Rules of the United States Court of Claims:

(b) ". . . . a party against whom a claim or counterclaim is asserted may at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(d). . . . the judgement sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

4. Title 28 United States Code, section 1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1.) Founded on the Constitution.

(2.) Founded on an Act of Congress.

(3.) Founded on any regulation of an executive department.

(4.) Founded upon any express or implied Contract with the United States.

(5.) For liquidated or unliquidated damages not sounded in tort.

5. Title 23 United States Code as set forth in Appendix B.

6. Title 23 Code of Federal Regulations as set forth in the Appendix C.

STATEMENT OF THE CASE

The Petitioner, an Ohio Corporation engaged in the highway construction business, sued Respondent for damages in the sum of $6,000,000 in connection with six contracts executed in 1956 and 1957 for the building of certain Federal-Aid Highway projects in the State of Ohio.

In two of the contracts the Petitioner was the principal contractor, and in the other four it was a subcontractor under Maxon Construction Company, Inc., the principal contractor.

The contracts were awarded on a competitive bidding basis as prescribed by the Respondent and were forwarded to the Bureau of Public Roads for approval. Upon the approval of

the contracts, the Bureau of Public Roads authorized the State of Ohio to sign the contracts for the actual construction of the Federal-Aid Highways.

The Bureau of Public Roads prescribed the terms and the form of the contracts and the contracts specifically state that the construction of the highways are subject to the inspection, at all times, and approval of the Bureau of Public Roads, all in accordance with the rules and regulations of the Federal-Aid Highways Act. The terms of the contract, insofar as the contractors obligations are concerned, are designed to protect and benefit the Respondent as well as the State of Ohio.

Prior to the Petitioner submitting bids for the construction of Federal-Aid Highways it was necessary that it be approved by the Bureau of Public Roads.

In May of 1958 Petitioner encountered financial difficulty and was forced to close down all the existing jobs under construction. In July of 1958, Maxon Construction Company, Inc., notified the Ohio State Highway Department that they were about to default the Petitioner on all uncompleted sub-contracts. The Ohio State Highway Department, however, refused to honor such defaults. In August of 1958, W. C. Wright was contacted through the Ohio State Highway Department, for the purpose of having, him, W. C. Wright, re-organize the Petitioner's Corporation in order that the projects under construction could be completed. After numerous discussions with the Ohio State Highway Department and the Bureau of Public Roads, W. C. Wright was assured of the fullest cooperation in the re-organization of Petitioner's Corporation. In December of 1958, W. C. Wright agreed to reorganize the Petitioner's Corporation, which plan was accepted and approved by the Ohio State Highway Department and the Bureau of Public Roads.

The Petitioner completed all the obligations and requirements of the contracts and subsequent change orders required by and approved by the Bureau of Public Roads. The Bureau of Public Roads made continuous inspections throughout the period of construction of the highways and had personal knowledge of the reasonable additional costs for which Petitioner seeks recovery. Upon Petitioner's completion of the

contracts, the Bureau of Public Roads as well as the State of Ohio accepted and approved the completed projects.

The Petitioner was advised that he would have to secure reimbursement for its reasonable additional costs through the Ohio Sundry Claims Board, which is a non-judicial body, operates without any prescribed or uniform rules of procedure and is not a body of record. No provisions are made for appeal from this body to a judicial tribunal. It is also to be noted that the Respondent does not recognize the Sundry Claims Board as a body competent to determine such claims as herein involved and will not participate in any awards made by said Sundry Claims Board. A claim in the amount of $2,923,573.22 was filed with the Ohio Sundry Claims Board which approved and paid $195,690.00. Leaving a balance unpaid of $2,727,-883.22.

The basis of Petitioner's claim against the Respondent in that during the actual construction by Petitioner, the State of Ohio did not timely obtain right-of-way nor remove obstructions therefrom as required by 23 Code of Federal Regulations 1.23 (Appendix C, page 36a), did not promptly provide time extention as promised, required work to be done in wet and freezing weather, directed that work be done under traffic conditions, forced Petitioner to subcontract some of the work to others at increased costs and required revisions of the original plans and specifications. However, it must be understood that these actions on the part of the State of Ohio were done as required by, under the direction, and with the approval of the Bureau of Public Roads.

ARGUMENT: QUESTION 1.

It was Petitioner's contention in the United States Court of Claims that pursuant to 23 United States Code, Congress did, through the State of Ohio specifically permit Federal Funds to become obligated for the benefit of the Petitioner. The position taken by the Petitioner has created a most important Federal question which was decided on summary motion by the United States Court of Claims adverse to Petitioner's contention. Moreover, this Federal question presented by Petitioner has not heretofor been decided by the United States Supreme Court.

First of all, it must be understood that Congress did authorize funds to be used for the construction of Federal-Aid Highways throughout the 50 states. The Secretary of Commerce, upon Congress' authorizing the funds for the construction of the Federal-Aid Highways, apportioned the Federal Funds so authorized among the several states for expenditure pursuant to 23 United States Code 102 (Appendix B, page 6a) and 23 United States Code 104, as amended (Appendix B, page 6a). After the apportionments were made by the Secretary of Commerce, the State of Ohio submitted to the Secretary of Commerce a program of proposed projects for the utilization of the Federal Funds so apportioned. The program proposed by the State of Ohio was approved by the Secretary of Commerce and the Administrator of the Bureau of Public Roads as provided in accordance with 23 United States Code 105 (a) which states as follows:

> "As soon as practicable after the apportionments for the Federal-Aid systems have been made for any fiscal year, the State Highway Department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-Aid system."

and 23 Code of Federal Regulations 1.6 (a) which states as follows:

> "To insure continuity in the direction of expenditures of available funds, systems of Federal-Aid Highways are selected or designated by any State that desires to avail itself through its State Highway Department, of the benefits of Federal aid for Highways. Upon approval by the Administrator of the selections or designations by a State Highway Department, such highways shall become portions of the respective Federal-Aid Highway systems, and all Federal-Aid apportionments shall be expended thereon."

The case in question involves a number of revisions from the original proposed projects which were submitted and approved by the Federal Highway Administration in accordance

with 23 Code of Federal Regulations 1.6 (b) which states as follows:

> "A State Highway Department may propose revisions, including additions, deletions or other changes, in the routes comprising the approved Federal-Aid Highway systems. Any such revision shall become effective only upon approval thereof by the Administrator upon a determination that such revision is in the public interest and consistent with Federal laws. There is no predetermined time limit for the submission of the full selection of the systems."

After such approval of the program the State of Ohio through its highway department submitted to the Secretary of Commerce for approval surveys, plans, specifications and estimates of the proposed projects which were approved by the Secretary of Commerce. It is at this point that Petitioner contends that Congress has specifically permitted the Federal Funds to be obligated by the State of Ohio for the actual construction of the Federal-Aid Highways subject only to a project agreement between the State of Ohio and the Secretary of Commerce as set forth in 23 United States Code 110 (Appendix B, page 6a). Also subject to the letting of the contracts pursuant to 23 United States Code 112 (Appendix B, page 6a), wherein this Petitioner's contracts were submitted by closed bid approved by the Secretary of Commerce and subsequently signed by the State of Ohio.

Petitioner contends that the language of 23 United States Code 106 (a) which states as follows:

> "Except as provided in section 117 of this title, the State Highway Department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."

specifically permits the State of Ohio to obligate the Federal Funds for the specific use on an approved Federal-Aid Pro-

ject. It would be inconceivable that the State could sign a contract with Petitioner for the construction of Federal-Aid Highways knowing they had to pay for the cost of its construction from its own funds. It is Petitioner's contention that the State of Ohio was without sufficient funds to pay the enormous cost of construction of the Federal-Aid Highway in the State of Ohio. That the State of Ohio could proceed with the program only on basis that it was permitted to obligate Federal Funds for the actual construction of the Federal-Aid Highways. It is abundantly clear from the quoted language of 23 United States Code (Appendix B), that Congress intended to permit the Federal Funds to become obligated for the specific payments of the cost of construction, subject to the Petitioner constructing the Federal-Aid Highway in accordance with the executed contract which was submitted by Petitioner, approved by the Secretary of Commerce and signed by the State of Ohio, and subject to the inspection and final approval of the Bureau of Public Roads.

It was Petitioner's contention that he did perform in accordance with the terms of the contract and that his entire work product was inspected throughout by the Bureau of Public Roads and finally approved as being totally satisfactory by the Bureau of Public Roads.

The Respondent has suggested throughout its brief in support of its motion for summary judgment in the court below and the Court of Claims has suggested in its opinion (Appendix A) that the arrangement created by Congress pursuant to 23 United States Code was one of reimbursement, wherein the State of Ohio obligated and expended its own funds and then requested reimbursement from the Federal Government for a percentage of the cost of construction.

It has been and still is the Petitioner's contention that Respondent and the Court of Claims has been in error. First of all Congress was well aware of the meaning of reimbursement since they have referred to reimbursement in 23 United States Code 123 (a) wherein Congress provided as follows:

> "When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-Aid primary or secondary systems or on the Interstate system, including extensions thereof within urban areas, Federal Funds may be used to reim-

> burse the State for such cost in the same proportion as Federal Funds are expended on the project. Federal Funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-Aid Highway projects for which Federal Funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities."

therefore, it may well be concluded that Congress specifically avoided creating a reimbursable situation between the Respondent and the State of Ohio which is contrary to the decision of the United States Court of Claims (Appendix A) and Respondent's position in support of its motion for summary judgment. The language quoted in 23 United States Code (Appendix B) suggests that Congress has permitted the Federal Funds to be obligated by the State of Ohio for the benefit of the contractor who did the actual construction, thus making the Respondent legally responsible for the damages incurred by Petitioner.

ARGUMENT: QUESTION 2.

It is Petitioner's contention that cited language of Title 23 United States Code (Appendix A), Title 23 Code of Federal Regulations (Appendix C) and the facts involved does create an agency within the individual State Highway Departments, thus making the Respondent liable to Petitioner as principal for the claim herein.

The Respondent has completely eliminated any possibility of agency simply by failing to accept any of Petitioner's allegations asserted in the Court of Claims, and the Court of Claims merely stated in its opinion (Appendix A) that the acts of the Respondent were sovereign acts of the Respondent. Petitioner concurs that they were sovereign acts of the Respondent but not such sovereign acts as to give the Respondent immunity.

Petitioner contends that there is not just a grant of funds involved herein, but rather direct, substantial, and deliberate action of the Respondent pursuant to specific legislation and

that the injury to Petitioner is a direct taking of its property for a public work. It is the Respondent who has received a direct and substantial benefit from Petitioner's work product since it now has a Federal-Aid highway to be used for the National and Civil Defence and Interstate Commerce.

Congress has in fact permitted the individual states to obligate Federal Funds for the actual construction of Federal-Aid highways pursuant to 23 United States Code 105 (Appendix B, page 6a), 23 United States Code 106, (Appendix B, page 6a). However, subject to 23 Code of Federal Regulations 1.3 (Appendix C, page 36a), 23 United States Code 110, (Appendix B, page 6a) and 23 United States Code 112, (Appendix B, page 6a), the Bureau of Public Roads further exercised actual control over the construction of the Federal-Aid highways by having its employees and officers inspect the actual construction at different stages of the construction in order to insure that the highways were being constructed in accordance with the Federal regulations and specifications set forth in the contracts.

The contracts that were executed by the State of Ohio and Petitioner were orginally drafted by the Bureau of Public Roads and designed to protect the Respondent. All contracts were first submitted to the Bureau of Public Roads for approval, who then authorized the State of Ohio to sign the approval contracts.

Petitioner respectfully submits that the action by the Court of Claims in dismissing Petitioner's petition on summary motions has constituted an interpretation of an act of Congress not heretofore deceided by this Court. Petitioner further contends that the Court of Claims has erred in accepting the facts most favorable to the Respondent in light of a most important question not heretofore deceided by this Court.

ARGUMENT: QUESTION 3.

Petitioner argued in the Court below, that among other grounds, 23 United States Code constituted an Act of Congress under which the Court of Claims could both assume jurisdiction and grant the relief sought. Petitioner pointed to specific sections of 23 United States Code that allow him to bring his suit before the Court of Claims. Had he been allowed

to present proofs concerning actions of the Bureau of Public Roads, under the authority of 23 United States Code, the meaning and full scope of that legislation would have been made clear and Petitioner's position and contentions substantiated.

The Court below, by dismissing Petitioner on summary motion decided, among other things, that there was no Act of Congress (see 28 United States Code, sec. 1491 (2)) under which that court could assume jurisdiction and grant or refuse relief. In other words, Petitioner did not according to that court, state a cause of action under that jurisdictional clause (28 United States Code, sec. 1491 (2)) so as to give the Court of Claims jurisdiction.

> "Whether the Complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact, it must be decided after and not before the Court has assumed jurisdiction over the controversy." **Bell v. Hood**, 327 U. S. 678 (1946). (For further cases, see Petitioner's Brief in the Court below, page 17).

The Court of Claims not only decided this question of law without any proofs, affidavits or testimony before it but it also made many critical findings of fact, again without benefit of any record, before reaching the legal questions concerning the adequacy of Petitioner's petition in that Court.

This very important question of whether the quoted provisions of 23 United States Code (Appendix B) constitutes such an Act of Congress so as to permit persons harmed thereby to maintain an action in the Court of Claims should now be decided by this Court.

It is clear that the Congress, upon enacting the various quoted provisions of 23 United States Code (Appendix B), did not declare that only the several states should be responsible to those persons constructing Federal-Aid highways for contracted construction costs. Petitioner contended below that although the terms of that legislation neither affirmed or denied its contentions in explicit language, by fair implication it was afforded a right of recovery from the Respondent as well as the particular state involved. Even if it were the case that Congress did not envision such a situation as herein involved, this fact should have prompted a more thorough examina-

tion of Petitioner's claim below and now demands that this Court examine the quoted provisions of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C), so as to ascertain the intent of Congress.

This Court should further determine whether it is within the power of the United States Court of Claims to impose a particular interpretation upon statutory language, upon motion for summary judgment so as to deny Petitioner an opportunity to support allegations which, both under this Court's and the Court of Claims' rulings, would have allowed Petitioner recovery. This Court has said concerning claims founded upon Acts of Congress:

> ". . . . If the (Claimant) asserts that his claim 'arises under' or is 'founded on' federal legislation or regulations to determine whether that claim is well founded, the Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative." **Montana-Dakata Utilities Co. v. Northwest Public Service Co.**, 341 U. S. 246 (1952).

In dismissing Petitioner's Petition on summary motion, the Court of Claims ignored the above language of this Court and also its own recent holding in **Ralston Steel v. U. S.**, wherein it was said:

> "In general a Claimant also says that he is entitled to money from the United States because a statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claimss, at least if his claim is not frivolous but arguable. Where an Act of Congress or an executive regulation . . . . arguably confers such rights upon the Claimant the Court will assume jurisdiction and decide his case on the merits . . . ." (emphasis supplied).

Petitioner does not contend, contrary to the Court of Claims opinion (Appendix A) that other **Federal** Grants or other reimbursible aid programs are subject to the same right of recovery against the United States by a contractor for work performed. It is only the specific provisions of 23 United States Code (Appendix B) together with the Acts of the Department of Commerce, Bureau of Public Roads that Petitioner points to as constituting an Act of Congress allowing of recovery from the United States directly.

ARGUMENT: QUESTION 4.

It is Petitioner's contention that Congress through its power to regulate commerce and provide for the National Defense did take Petitioner's property for a public use without just compensation contrary to the Fifth Amendment of the United States Constitution.

It should be noted that Congress, in a declaration of policy, declared that it was in the National interest to accelerate the construction of Federal-Aid highways as our National highway system had been inadequate to meet the needs of the National and Civil defense and Interstate Commerce. 23 United States Code 101 (b) (Appendix B, page 6a).

It is abundantly clear that Petitioner's property in this case has been "taken" for this Court has held that "it is not necessary property be 'taken,' it is sufficient if the action by the Government involves a direct interference with a disturbance of property rights." **Pumpelly v. Green Bay Company, 80 U. S. 166 (1871); United States v. Lynah, 188 U. S. 445 (1903); United States v. Cress, 243 U. S. 316 (1917);** Nor need the government directly appropriate the title, possession, or use of the properties in question. **United States v. General Motors Corporation 323 U. S. 373 (1945).**

The ownership of the highways in question has no bearing on the issue of an unconstitutional taking of the property herein involved and this is supported by the above cases. "If the governments' . . . . (acts) make it possible for another to get the benefits of their property, the United States is liable just as if it used the property itself." **Ivey v. United States, 88 F. Supp. 6, 8, (1950).**

In the present case it was Congress who created the gigantic Federal-Aid highway system and who declared it to be most important for the National and Civil Defense and Interstate Commerce. It is Congress who created the Bureau of Public Roads, within the Department of Commerce, with the full power to carry out the responsibilities and authorities with respect to Federal-Aid highway construction, administration, and research as prescribed in 23 United States Code entitled "Highways."

The Court of Claims has in its opinion (Appendix A) indicated that the Petitioner has not made a showing that there

has been any affirmative acts on the part of the Bureau of Public Roads to as to deprive the Petitioner of its property or even interfere or disturb its property rights in question. This conclusion on the part of the Court of Claims, which is unquestionably denied by Petitioner, completely ignores the purpose for which the Federal-Aid highways were constructed, the entire cited language of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) and the actual on the job supervisory authority exercised by employees, officers and agents of the Bureau of Public Roads over this Petitioner during the construction of the Federal-Aid highways.

However, it certainly should be clearly understood that Petitioner has been unable to obtain all the factual information necessary to make certain allegations because the facts are possessed by employees, officers and agents of the Respondent and if given the opportunity the Petitioner will be able to point out to the Court specific times, places and the employees, officers and agents who have directly dealt with the Petitioner involving the claims in question.

Petitioner respectfully submits that the Court of Claims has erred in its opinion (Appendix A) and that the Petitioner should be given the opportunity to present his proofs in support of its allegations in order to establish that its property has been taken by Respondent in violation of the Fifth Amendment of the United States Constitution.

ARGUMENT: QUESTION 5.

Petitioner contends that his summary dismissal in the Court of Claims was erroneous in that the Court of Claims thereupon did decide material issues of fact and law contrary to Rule 64 Court of Claims Rules, and Rule 20 (b) Court of Claims Rules and contrary to innumerable decisions of this Court.

Moreover, Petitioner contends that the legislation involved herein is of such national import, expending such large sums of money and affecting such a number of persons, that the questions herein raised and incidentally decided by the Court of Claims should be accorded a full hearing and certainly not be dismissed on summary motions. Certainly constitutional

and other questions of a large public import should not be decided on an inadequate factual basis. (See **Poller v. C.B.S.**, 368 U. S. 464.)

There were issues of fact and law concerning the extent of Respondent's contact with Petitioner, the legal consequences of such contacts, the construction of the language contained within 23 United States Code as to whether Congress was merely "reimbursing" the several states or had created an entirely different situation so as to admit of liability to parties other that the several states. Upon this point the Court of Claims rested its decision upon allegations of reimbursement contained within Respondant's brief in support of the motion for summary judgment, apparently dismissing Petitioner's allegations to the contrary and further relying upon the case of **Eden Memorial Park Association v. United States**, 300 F. 2d 432, 439 (Appendix A), a case wherein none of the issues at bar here were before the Court, although seemingly the only instance wherein the language of a decision of a Federal Court deals with the agency on non-agency of State and Federal acts under the quoted provisions of 23 United States Code (Appendix B).

Petitioner maintains that if this is to be the law, respecting a rather important enactment of Congress, it should be so only upon a more complete hearing and an examination of the proofs that might be offered in support of Petitioner's contention concerning the interpretation and construction of the language contained within 23 United States Code (Appendix B) as well as 23 Code of Federal Regulations (Appendix C).

The Court of Claims has, by its decision (Appendix A) passed upon the legal questions presented for this Court's consideration on the basis of the original petition as submitted to that Court. This Court has not, as yet, had the occasion to interpret the quoted provisions of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) that Petitioner points to as according him the right to be heard in the Court of Claims and therefore, it is submitted that this question should now be decided by the Supreme Court of the Court of the United States so as to clear up the ambig-

ui'les contained therein concerning the liability of the United States Government in this instance.

Petitioner further contends that the petition submitted in the Court of Claims certainly encompased broad enough language as to allow possible amendments should proofs allow such amendments.

The action of the Court of Claims has precluded Petitioner from ever submitting his claim for a fair and impartial hearing before a competent judicial body. It is obvious from the very nature of the case that those are enormous factual and legal questions presented; however, the opinion of the Court of Claims (Appendix A) has summarily decided all the factual and legal questions most favorably to the Respondent and contrary to the position taken by the Petitioner.

Petitioner contends that should this Court grant this Writ of Certiorari that it will be able to clearly point out the immumerable legal and factual questions presented by Petitioner, and incidentally substantiate his contention that the Court of Claims has committed substantial error by granting Respondent's motion for summary judgment.

ARGUMENT: QUESTION 6.

Concerning the last question presented for this Court's consideration: The Court below held, in its opinion granting Respondent's motion for summary judgment, that there were no acts alleged on the part of Respondent which would give rise to liability in this instance (Appendix A). Petitioner contends that the petition and brief opposing summary judgment clearly points to multiple affirmative acts by Respondent, as do the facts as set forth within this petition and again, Petitioner would point out that the Court below was at this point deciding factual issues, at best, and more probably ignoring or dismissing Petitioner's allegations as to the actions and involvements of Respondent's agents and officers.

The decision of the Court of Claims on this point raises, indeed, some very serious questions concerning the protections of the Fifth Amendment of the United States Constitution.

Pitioner has steadfastly maintained in the Court below that the acts of Respondent's agents and officers, and as au-

thorized by quoted provisions of 23 United States Code (Appendix B) resulted in Petitioner's loss.

The impact and fair import of the Court of Claims decision is that Congress may (now) enact legislation initiating Federal programs such as that involved herein, placing the responsibility for administration, direction, and all final decisions involving such programs with a Federal agency, directing that the Federal agency inspect and approve as in this instance a State Highway Department, the contractor, its bid, all work done (dealing directly with the contractor all the while), materials used, and the final product, appropriate funds and pledge the credit of the United States Government for such programs, ultimately complete such programs through the efforts of persons such as your Petitioner, and then deny responsibility for non-payment of sums owing on the grounds that the particular states involved were the signators or parties to the construction contracts.

To say further, as the Court of Claims has done, that the United States Constitution does not require that compensation be made in such cases as in herein involved is to ignore not only past decisions of that Court, but also of this honorable Court.

A serious question requiring this Court's attention is thus raised: May the United States participate and control to the extent that it has in the instant case and others pursuant to congressional authorization and deny liability for payment of monies pledged on the grounds that the states are only parties responsible, without violating the provision of the United States Constitution and particularly the Fifth Amendment? Similarly, did Congress intend by the quoted provision of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) to place the entire responsibility for the implementations of the programs therein envisioned with the Department of Commerce, Bureau of Public Roads, and at the same time insulate the United States from any liability for payment to persons such as Petitioner herein when a state, in violation of the provisions of that legislative program refuses to complete payments upon contracts let and completed pursuant to such programs?

Petitioner respectfully submits that this is the interpretation

that the Court of Claims has placed upon the legislation involved, and as such, this interpretation does not comply with the requirements of due process of law under decisions of this Court.

CONCLUSION

The questions presented on the Writ of Certiorari are of public importance, effecting both the Federal and State highway construction program, the highway construction industry and a broad spectrum of governmental morality. They involve the responsibility and obligation of the Federal government. There are numerous questions of both fact and law which have not heretofore been decided by this Court. The questions involve the constitutional rights of all persons who may be involved in the construction of Federal-Aid highways. Petitioner submits that the precedents established by this Court do not support the decision of the Court of Claims but require its reversal so that Petitioner may proceed with the trial of the questions involved. The questions presented as so substantial as to require plenary consideration with brief on its merits and oral argument for their resolution.

May 10th, 1967

Respectfully submitted,
DONALD A. MOON
134 West Main Street
Brighton, Michigan

APPENDIX A

ORDER OF

the United States Court of Claims

No. 422-65

(Decided February 17, 1967)

D. R. SMALLEY & SONS, INC., v. THE UNITED STATES

Donald A. Moon, attorney of record for plaintiff.

Ray Goddard, with whom was **Assistant Attorney General Barefoot Sanders**, for defendant.

Before Cowen, **Chief Judge**, Laramore, Durfee, Davis, Collins, Skelton, and Nichols, **Judges**.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SKELTON, **Judge**, delivered the opinion of the court:

The plaintiff, an Ohio Corporation engaged in the highway construction business, sued defendant for damages in the sum of $6,000,000 in connection with six contracts executed in 1956 and 1957 for the building of certain Federal-Aid Highway projects in the State of Ohio.

In two of the contracts the plaintiff was the principal contractor, and in the other four it was a subcontracor under Maxon Construction Company, Inc., the principal contractor, who is not a party to this suit. The State of Ohio was the other contracting party in all of the contracts. The United States was not a party to any of the contracts.

The agreements between plaintiff and the State of Ohio required the plaintiff to furnish all labor and materials and to build the highways involved in accordance with the plans

and specifications agreed upon by the parties for which the plaintiff would be paid the various sums of money specified in the respective contracts.

The projects were a part of the Federal-Aid Highway System of interstate highways on which the United States would reimburse the State of Ohio to the extent of the ninety per cent of the total cost in accordance with the various Federal-Aid Highway Acts passed by Congress.[1] The state would pay the other ten per cent of the total cost.

Plaintiff alleged that: the contracts were drafted pursuant to standards and regulations required by defendant; the defendant approved the contracts and they were executed with its express approval; and all changes in the contracts were required to be submitted to defendant for its approval.

During the course of the work on the projects, the plaintiff encountered many difficulties, financial and otherwise, and completed the work only after reorganizing its corporate structure and by subletting portions of the contracts to other contractors. It claims that it lost by way of damages on all six projects the sum of $2,923,573.22. A claim in this amount was filed with the Ohio Sundry Claims Board, which approved and paid the claim to the extent of $195,690, leaving $2,727,883.22 unpaid. The plaintiff has filed this suit to recover such balance, together with other alleged damages to which it claims it is entitled, all in to the total sum of $6,000,000.

The basis of plaintiff's claims against the State of Ohio and now against the United States was that during the work on the highway projects the state did not timely obtain rights-of-way nor remove obstructions therefrom, did not promptly provide time extensions as promised, required work to be done in wet and freezing weather, directed that work be done under traffic conditions, forced plaintiff to subcontract some of the work to others at increased costs, and admitted liability on certain phases of the projects that required redesign of the plans.

Plaintiff's theory of recovery against the defendant is that by reason of the contents of the Federal-Aid Highway Acts, **supra**, including the provision obligating the Government to

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[1]Federal-Aid Highway Act of 1956, Ch. 462, § 108(d), 70 Stat. 374; Federal-Aid Highways, 23 U.S.C. § 120(c) (1964).

reimburse a state to the extent of ninety per cent of the cost of any approved highway project completed in the state as a part of the Federal-Aid Highway System, together with acts of the defendant in connection with the projects under consideration here, made the defendant the real party in interest instead of the State of Ohio.

The plaintiff contends that the State of Ohio was the agent of defendant and that defendant is liable for all of the wrongful acts and omissions of the state in connection with the contracts. To support this claim, plaintiff points out that: the contracts were drafted pursuant to the regulations and requirements of defendant; the contracts were approved by defendant; the work was inspected and approved by defendant as it progressed; changes in plans were approved by defendant; the final completion of the work was inspected and approved by the defendant; and defendant agreed by the provisions of the law to pay the state (for the benefit of plaintiff) ninety per cent of the cost of the contracts. By reason of these claims, plaintiff asserts that it had express contracts with the defendant and in the alternative, the defendant was bound by implied contracts. Also, plaintiff says that defendant has deprived it of its property without remuneration contrary to the fifth and fourteenth amendments of the United States Constitution.

Defendant answered by saying there was no privity of contract between it and the plaintiff, and the defendant has not given its consent to be sued. It also pleads the sovereign act doctrine as a defense. We believe the defendant is correct as to these defenses and that they are controlling in the disposition of this case.

When Congress passed the Federal-Aid Highway Acts which obligated the Government to reimburse the states to the extent of ninety per cent of the cost of construction of any approved highway that was a part of the Federal interstate system of roads, it exercised sovereign powers of the Government. Likewise, the establishment of standards and requirements, the approval of the form of contract, the inspection of work, and the payment of ninety per cent of the cost of each project to the state involved by the Bureau of Public Roads, were sovereign acts of the Government and

were not directed solely to the plaintiff but affected the general public and were done for the common good and the general welfare.

It is well established that the Federal Government is not liable for damages resulting from sovereign acts performed by it in its sovereign capacity. **Horowitz v. United States,** 267 U.S. 458, 461 (1925); **Jones v. United States,** 1 Ct. Cl. 383 (1865).

The National Government makes many hundreds of grants each year to the various states, to municipalities, to schools and colleges and to other public organizations and agencies for many kinds of public works, including roads and highways. It requires the projects to be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted. See **Mahler v. United States,** 306 F. 2d 713, 716-22 (3rd Cir. 1962), **cert. denied,** 371 U.S. 923. These grants are in reality gifts or gratuities. It would be farfetched indeed to impose liability on the Government for the acts and omissions of the parties who contract to build the projects, simply because it requires the work to meet certain standards and upon approval thereof reimburses the public agency for a part of the costs.

The plaintiff contends that by these acts of defendant made the State of Ohio its agent and by reason thereof it had express contracts with defendant and defendant is liable for the wrongful acts and omissions of Ohio. We do not agree. Such sovereign acts of defendant do not in any way make the State of Ohio its agent as claimed by plaintiff. See **Eden Memorial Park Association v. United States,** 300 F. 2d 432, 439 (9th Cir. 1962), wherein the court stated:

> Moreover, analysis of the Federal-Aid Highways Act indicates that while close cooperation between the United States and the individual states was contemplated, the states or their agencies or officials were in projects authorized by that act. * * *

The defendant did not sign the contracts with the plaintiff and there were no negotiations or communications whatsoever between them. Consequently, there were no express contracts between them.

The same reasoning applies to plaintiff's alternative claim that defendant is liable because of implied contracts with plaintiff. The sovereign acts of defendant described above do not impose liability on defendant for the acts and omissions of the State of Ohio on the theory if implied contract. The contracts were between the state and plaintiff.

Accordingly, since there was no privity of contract, express or implied, between plaintiff and defendant, the defendant is not liable in contract for the damages claimed by plaintiff.

We now come to the claim of plaintiff that defendant has deprived it of its property without compensation in violation of the fifth and fourteenth amendments to the Constitution. All of the acts and omissions complained of by plaintiff were those of the State of Ohio. It does not allege a single affirmative act on the part of defendant that deprived it of any of its property nor that interferred with or disturbed its property rights in any way. Without such allegations, plaintiff cannot recover damages from defendant on this theory. **Biggs Rental Co. v. United States**, 173 Ct. Cl. 789, 796, 353 F. 2d 1013, 1017 (1965), **cert. denied**, 384 U. S. 927 (1966).

Since we have held that the defendant is not liable to plaintiff by reason of its sovereign acts, and there is no privity of contract between them, express or implied, and defendant has not deprived plaintiff of its property in violation of the fifth and fourteenth amendments to the Constitution, it follows that plaintiff cannot recover.

Accordingly, defendant's motion for summary judgment is hereby granted and plaintiff's petition is dismissed.

APPENDIX B

VOL. I. TITLE 23, UNITED STATES CODE "HIGHWAYS", and SECTIONS 2, 3, 4, and 5, of PUBLIC LAW 85—767, AUG. 27, 1958

TITLE 23, UNITED STATES CODE—"HIGHWAYS"

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1 Repealed by sec. 21(d) of Public Law 86-70, June 25, 1959 (73 Stat. 141).
2 New sec. added by sec. 4 of Public Law 85-857, July 14, 1960 (74 Stat. 522).

Chapter 1—FEDERAL-AID HIGHWAYS

Sec. 101. Definitions and declaration of policy

(a) As used in this title, unless the context requires otherwise—

The term "apportionment" in accordance with section 104 of this title includes unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of Commerce), costs of rights-of-way, and elimination of hazards of railway grade crossings.

The term "county" includes corresponding units of government under any other name in States which do not have county organizations, and likewise in those States in which the county government does not have jurisdiction over highways it may be construed to mean any local government unit vested with jurisdiction over local highways.

The term "forest road or trail" means a road or trail wholly or partly within or adjacent to and serving the national forests.

The term "forest development roads and trails" means those forest roads or trails of primary importance for the protection, administration, and utilization of the national forests, or where necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent.

The term "forest highway" means a forest road which is of primary importance to the States, counties, or communities within, adjoining, or adjacent to the national forests.

The term "highway" includes roads, streets, and parkways, and also includes rights-of-way, bridges, railroad-highway crossings, tunnels, drainage structure, signs, guardrails, and protective structures, in connection with highways. It further includes that portion of any interstate or international bridge or

tunnel and the appproaches thereto, the cost of which is assumed by a State highway department including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

The term "Federal-aid highways" means highways located on one of the Federal-aid systems described in section 103 of this title.

The term "Indian reservation roads and bridges" means roads and bridges that are located within an Indian reservation or that provide access to an Indian reservation or Indian land, and that are jointly designated by the Secretary of the Interior and the Secretary as a part of the Indian Bureau road system.

The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.

The term "park roads and trails" means those roads or trails, including the necessary bridges, located in national parks or monuments, now or hereafter established, or in other areas administered by the National Park Service of the Department of the Interior (excluding parkways authorized by Acts of Congress) and also including approach roads to national parks or monuments authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended.

The term "parkway" as used in chapter 2 of this title means a parkway authorized by an Act of Congress on lands to which title is vested in the United States.

The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.

The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (a) of section 110 of this title.

The term "public lands development roads and trails" means those roads or trails which the Secretary of the Interior determines are of primary importance for the development,

protection, administration, and utilization of public lands and resources under his control.[7]

The term "public lands highways" means main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations.

The term "rural areas" means all areas of a State not included in urban areas.

The term "Secretary" means Secretary of Commerce.

The term "State" means any one of the fifty States, the District of Columbia, or Puerto Rico.[8]

The term "State funds" includes funds raised under the authority of the State or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

The term "State highway department" means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction.

The term "Federal-aid system" means any one of the Federal-aid highway systems described in section 103 of this title.

The term "Federal-aid primary system" means the Federal-aid highway system described in subsection (b) of section 103 of this title.

The term "Federal-aid secondary system" means the Federal-aid highway system described in subsection (c) of section 103 of this title.

The term "Interstate System" means the National System of Interstate and Defense Highways described in subsection (d) of section 103 of this title.

The term "urban area" means an area including and adjacent to a municipality or other urban place having a population of five thousand or more, as determined by the latest available Federal census, within boundaries to be fixed by a State highway department subject to the approval of the Secretary.

(b) It is hereby declared to be in the national interest to

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[7] Amended by sec. 6(a) of Public Law 87-866, Oct. 23, 1962 (76 Stat. 1145).

[8] Amended by sec. 21(e) (1) of Public Law 86-70, June 25, 1959 (73 Stat. 141), and by sec. 17(a) of Public Law 86-624, July 12, 1960 (74 Stat. 411).

accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the fifteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1971, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.[9]

Sec. 102. Authorizations

The provisions of this title apply to all unappropriated authorizations contained in prior Acts, and also to all unexpended appropriations heretofore made, providing for the expenditure of Federal funds upon the Federal-aid systems. All such authorizations and appropriations shall continue in full force and effect, but hereafter obligations entered into and expenditures made pursuant thereto shall be subject to the provisions of this title.

Sec. 103. Federal-aid systems

(a) For the purposes of this title, the three Federal-aid systems, the primary and secondary systems, and the Inter-

[9] Amended by sec. 3 of Public Law 88-423, Aug. 13, 1964 (78 Stat. 397).

state System, are continued pursuant to the provisions of this section.

(b) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (e) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated, said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(c) The Federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (e) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension pass through the urban area or connect with another Federal-aid system within the urban area.[10]

[10] Amended by sec. 8(a) of Public Law 87-866, Oct. 23, 1962 (76 Stat. 1145).

(d) The Interstate System shall be designated within the United States, including the District of Columbia and it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense, and to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsecion (b) of this section. This system may be located both in rural and urban areas.[11]

(e) The Secretary shall have authority to approve in whole or in part the Federal-aid primary system, the Federal-aid secondary system, and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No Federal-aid system or portion thereof shall be eligible for projects in which Federal funds participate until approved by the Secretary.

(f) See footnote.[12]

(g) See footnote.[13]

Sec. 104. Apportionment

(a) Whenever an apportionment is made of the sums authorized to be appropriated for expenditure upon the Federal-aid systems, the Secretary shall deduct a sum, in such amount not to exceed 3¾ per centum of all sums so authorized, as the Secretary may deem necessary for administering the provisions of law to be financed from appropriations for the Federal-aid systems and for carrying on the research authorized by subsections (a) and (b) of section 307 of this title. In

[11] Amended by sec. 17(c) of Public Law 86-624, July 12, 1960

[12] Repealed by sec. 21 (d) (1) of Public Law 86-70, June 25, 1959 (73 Stat. 141).

[13] Repealed by sec. 17(b) of Public Law 86-624, July 12, 1960 (74 Stat. 411).

making such determination, the Secretary shall take into account the unexpended balance of any sums deducted for such purposes in prior years. The sum so deducted shall be available for expenditure from the unexpended balance of any appropriation made at any time for expenditure upon the federal-aid systems, until such sum has been expended.

(b) On or before January 1 next preceding the commencement of each fiscal year, except as provided in paragraphs (4) and (5) of this subsection, the Secretary, after making the deduction authorized by subsection (a) of this section, shall apportion the remainder of the sums authorized to be appropriated for expenditure upon the Federal-aid systems for that fiscal year, among the several States in the following manner:

(1) For the Federal-aid primary system:

One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery and star routes in all the States at the close of the next preceding calendar year, as shown by a certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary. No State shall receive less than one-half of 1 per centum of each year's apportionment.[14, 15]

(2) For the Federal-aid secondary system:

One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the rural population of each State bears to the total rural population of all the States as shown by the latest available Federal census; and one-third in the ratio which the mileage of rural delivery and star routes, certified as above provided, in each States bears to the total mileage of rural delivery and star routes in all the States. No State

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[14, 16] Amended by sec. 21(e) (2) of Public Law 86-70, June 25, 1959 (73 Stat. 141).

[15] Amended by sec. 10(a) of Public Law 87-866, Oct. 23, 1962 (76 Stat. 1145).

shall receive less than one-half of 1 per centum of each year's apportionment.[16]

(3) For extensions of the Federal-aid primary and Federal-aid secondary systems within urban areas:

In the ratio which the population in municipalities and other urban places of five thousand or more in each State bears to the total population in municipalities and other urban places of five thousand or more in all the States as shown by the latest available Federal census.[17]

(4) For the Interstate System, for the fiscal years ending June 30, 1957, June 30, 1958, and June 30, 1959:

One-half in the ratio which the population of each State bears to the total population of all the States as shown by the latest available Federal census, except that no States shall receive less than three-fourths of 1 per centum of the funds so apportioned; and one-half in the manner provided in paragraph (1) of this subsection. The sums authorized by section 108(b) of the Federal-Aid Highway Act of 1956 for the fiscal years ending June 30, 1958, and June 30, 1959, shall be apportioned on a date not less than six months and not more than twelve months in advance of the beginning of the fiscal year for which authorized.

(5) For the Interstate System for the fiscal years 1960 through 1971:

For the fiscal years 1960 through 1966, in the ratio which the estimated cost of completing the Interstate System in such State, as determined and approved in the manner provided in this paragraph, bears to the sum of the estimated cost of completing the Interstate System in all of the States. For the fiscal years 1967 through 1971, in the ratio which the Federal share of the estimated cost of completing the Interstate System in such State, as determined and approved in the manner provided in this paragraph, bears to the sum of the estimated cost of the Federal share of completing the Interstate System in all of the States. Each apportionment herein authorized for the fiscal years 1960 through 1971, inclusive, shall be made on a date as far in advance of the beginning of the fiscal year for which author-

[17] Amended by sec. 2 of Public Law 88-157, Oct. 24, 1963 (77 Stat. 276).

ized as practicable but in no case more than eighteen months prior to the beginning of the fiscal year for which authorized. As soon as the standards provided for in subsection (b) of section 109 of this title have been adopted, the Secretary, in cooperation with the State highway departments, shall make a detailed estimate of the cost of completing the Interstate System as then designated, after taking into account all previous apportionments made under this section, based upon such standards and in accordance with rules and regulations adopted by him and applied uniformly to all of the States. The Secretary shall transmit such estimates to the Senate and the House of Representatives within ten days subsequent to January 2, 1958. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1960, June 30, 1961, and June 30, 1962. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within 10 days subsequent to Jan. 2, 1961. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1963, June 30, 1964, June 30, 1965, and June 30, 1966. The Secretary shall make a revised estimate of the cost of completing the ten designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1965. Upon the approval of such estimate by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1967; June 30, 1968; and June 30, 1969. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit

the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1968. Upon the approval by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal year ending June 30, 1970. The Secretary shall make a final revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1969. Upon the approval by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal year ending June 30, 1971. Whenever the Secretary, pursuant to this subsection, requests and receives estimates of cost from the State highway departments, he shall furnish copies of such estimates at the same time to the Senate and the House of Representatives.[18, 19, 21, 22, 23]

(c) Not more than 20 per centum of the amount apportioned in any fiscal year, commencing with the apportionment of funds authorized to be appropriated under subsection (a) of section 102 of the Federal-Aid Highway Act of 1956 (70 Stat. 374), to each State in accordance with paragraphs (1), (2), or (3) of subsection (b) of this section may be transferred from the apportionment under one paragraph to the apportionment under any other of such paragraphs if such a transfer is requested by the State highway department and is approved by the Governor of such State and the Secretary as being in the public interest. The total of such transfers shall not increase the original apportionment under any of such paragraphs by

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[18, 22] Amended by sec. 3(a) and (b) of Public Law 88-157, Oct. 24, 1963 (77 Stat. 276).

[19] Approval of cost estimate as a basis for making I.S. apportionments for fiscal years ending June 30, 1960, 1961, and 1962, by sec. 8 of Public Law 85-381, Apr. 16, 1958 (72 Stat. 89); sec. 1 of Public Law 85-899, Sept. 2, 1958 (72 Stat. 1725); and sec. 103 of Public Law 86-342, Sept. 21, 1959 (73 Stat. 611); for fiscal years ending June 30, 1963, 1964, 1965, and 1966, by sec. 102 of Public Law 87-61, June 29, 1961 (75 Stat. 122); and for fiscal year ending June 30, 1967, by sec. 2 of Public Law 89-139, Oct. 22, 1965 (79 Stat. 578).

[21] Amended by sec. 4(a) of Public Law 88-423, Aug. 13, 1964 (78 Stat. 397).

[23] Amended by sec. 8(g) of Public Law 86-657, July 14, 1960 (74 Stat. 522).

more than 20 per centum. Nothing contained in this subsection shall alter or impair the authority contained in subsection (d) of this section.

(d) Any funds which are apportioned under paragraph (2) of subsection (b) of this section for the Federal-aid secondary system to a State in which all public roads and highways are under the control and supervision of the State highway department may, if the State highway department and the Secretary jointly agree that such funds are not needed for the Federal-aid secondary system, be expended for projects on another Federal-aid system.

(e) On or before January 1 preceding the commencement of each fiscal year, the Secretary shall certify to each of the State highway departments the sums which he has apportioned hereunder to each State for such fiscal year, and also the sums which he has deducted for administration and research pursuant to subsection (a) of this section.

Sec. 105. Programs

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require, except in States where all public roads and highways are under the control and supervision of the State highway department, that such project be selected by the State highway department and the appropriate local officials in cooperation with each other.

(c) In approving programs for projects on the Federal-aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways interstate in character.

(d) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation.

(e) See footnote.[24]

Sec. 106. Plans, specifications, and estimates

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

(b) In addition to the approval required under subsection (a) of this section, proposed specifications for projects for construction on the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, shall be determined by the State highway department and the appropriate local officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 10 per centum of the total estimated cost of a project financed with Federal-aid primary, secondary, or urban funds, after excluding from such total estimated cost, the estimated costs of rights-of-way, preliminary engineering, and construction engineering: Provided, That such limitation shall be 15 per centum in any State with respect to which the Secretary finds such higher limitation to be necessary. For any project financed with interstate funds, such limitation shall be 10 per centum.[25]

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[24] Repealed by sec. 17(b) of Public Law 86-624, July 12, 1960 (74 Stat. 411).

[25] Amended by sec. 7(a) of Public Law 88-157, Oct. 24, 1963 (77 Stat. 276).

Sec. 107. Acquisition of rights-of-way — Interstate System

(a) In any case in which the Secretary is requested by a State to acquire lands or interests in lands (including within the term "interests in lands," the control of access thereto from adjoining lands) required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including the Act of Feruary 26, 1931, 46 Stat. 1421), if—

(1) the Secretary has determined either that the State is unable to acquire necessary lands or interests in lands, or is unable to acquire such lands or interests in lands with sufficient promptness; and

(2) the State has agreed with the Secretary to pay, at such time as may be specified by the Secretary an amount equal to 10 per centum of the costs incurred by the Secretary, in acquiring such lands or interests in lands, or such lesser percentage which represents the State's pro rata share of project costs as determined in accordance with subsection (c) of section 120 of this title.

The authority granted by this section shall also apply to lands and interests in lands received as grants of land from the United States and owned or held by railroads or other corporations.

(b) The costs incurred by the Secretary in acquiring any such lands or interests in lands may include the cost of examination and abstract of title, certificate of title, advertising, and any fees incidental to such acquisition. All costs incurred by the Secretary in connection with the acquisition of any such lands or interests in lands shall be paid from the funds for construction, reconstruction, or improvement of the Interstate System apportioned to the State upon the request of which such lands or interests in lands are acquired, and any sums paid to the Secretary by such State as its share of the costs of acquisition of such lands or interests in lands shall be de-

posited in the Treasury to the credit of the appropriation for Federal-aid highways and shall be credited to the amount apportioned to such State as its apportionment of funds for construction, reconstruction, or improvement of the Interstate System, or shall be deducted from other moneys due the State for reimbursement from funds authorized to be appropriated under section 108(b) of the Federal-Aid Highway Act of 1956.

(c) The Secretary is further authorized and directed by proper deed, executed in the name of the United States, to convey any such lands or interests in lands acquired in any State under the provisions of this section, except the outside five feet of any such right-of-way in any State which does not provide control of assess, to the State highway department of such State or such political subdivision thereof as its laws may provide, upon such terms and conditions as to such lands or interests in lands as may be agreed upon by the Secretary and the State highway department or political subdivisions to which the conveyance is to be made. Whenever the State makes provision for control of access satisfactory to the Secretary ,the outside five feet then shall be conveyed to the State by the Secretary, as herein provided.

(d) Whenever rights-of-way, including control of access, on the Interstate System are required over lands or interests in lands owned by the United States, the Secretary may make such arrangements with the agency having jurisdiction over such lands as may be necessary to give the State or other person constructing the projects on such lands adequate rights-of-way and control of access thereto from adjoining lands, and any such agency is directed to cooperate with the Secretary in this connection.

Sec. 108. Advance acquisition of rights-of-way

(a) For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary, upon the request of the State highway department, is authorized to make available the funds apportioned to any State for expenditure on any of the

Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe. The agreement between the Secretary and the State highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding seven years following the fiscal year in which such request is made.[26]

(b) Federal participation in the cost of rights-of-way acquired under this section shall not exceed the Federal pro rata share applicable to the class of funds from which Federal reimbursement is made.

Sec. 109. Standards

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the plans, specifications, and estimates for actual construction of such project. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.[27]

(c) Projects on the Federal-aid secondary system in which Federal funds participate shall be constructed according to

[26] Amended by sec. 1 of Public Law 86-35, May 29, 1959 (73 Stat. 62)
[27] Amended by sec. 4 of Public Law 88-157, Oct. 24, 1963 (77 Stat. 276).

specifications that will provide all-weather service and permit maintenance at a reasonable cost.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices, complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to the reasonably necessary for road surfaces, median strips, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

Sec. 110 Project agreements

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

(b) The Secretary may rely upon representations made by the State highway department with respect to the arrange-

ments or agreements made by the State highway department and appropriate local officials where a part of the project is to be constructed at the expense of, or in cooperation with, local subdivisions of the State.

Sec. 111. Agreements relating to use of and access to rights-of-way—Interstate System

All agreements between the Secretary and the State highway department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed or located on the rights-of-way of the Interstate System. Such agreements may, however, authorize a State or political subdivision thereof to use or permit the use of the airspace above and below the established grade line of the highway pavement for such purposes as will not impair the full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System.[28, 29]

Sec. 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. **The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.**

(b) Construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating

[28] Amended by sec. 104(a) of Public Law 87-61, June 29, 1961 (75 Stat. 122).

[29] Revision of prior agreements, see sec. 104(b) of Public Law 87-61, June 29, 1961 (75 Stat. 122).

to such project, some other method is in the public interest. All such findings shall be reported promptly in writing to the Committees on Public Works of the Senate and the House of Representatives.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title.

Sec. 113. Prevailing rate of wage—Interstate System

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Interstate System authorized under section 108(b) of the Federal-Aid Highway Act of 1956, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 U.S.C., sec. 276a).

(b) In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on the Interstate System is to be performed. After giving due regard to the in-

formation thus obtained, he shall make a predetermination of the minimum wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project.

Sec. 114. Construction

(a) The construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision. **Except as provided in section 117 of this title, such construction shall be subject to the inspection and approval of the Secretary.** The construction work and labor in each State shall be performed under the direct supervision of the State highway department and in accordance with the laws of that State and applicable Federal laws. Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this title. On any project where actual construction is in progress and visible to highway users, the State highway department shall erect such informational sign or signs as prescribed by the Secretary, identifying the project and the respective amounts contributed therefor by the State and Federal Governments.[30]

(b) Convict labor shall not be used in such construction unless it is labor performed by convicts who are on parole or probation.

Sec. 115. Construction by States in advance of apportionment—Interstate System

(a) When a State has obligated all funds apportioned to it under subsection (b) (4) and (5) of section 104 of this title, and proceeds to construct any project without the aid of Federal funds, including one or more parts of any project, on the Interstate System as designated at that time, in accordance with all procedures and all requirements applicable to projects financed with Interstate System funds authorized to be appropriated under subsection (b) of section 108 of the Federal-Aid Highway Act of 1956, except insofar as such procedures

[30] Amended by sec. 8(f) of Public Law 86-657, July 14, 1960 (74 Stat. 522).

and requirements limit a State to the construction of projects with the aid of Federal funds previously apportioned to it, the Secretary, upon application by such State and his approval of such application, is authorized to pay to such State the Federal share of the costs of construction of such project when additional funds are apportioned to such State under subsection (b) (4) and (5) of section 104 of this title if:

(1) prior to the construction of the project the Secretary shall have approved the plans and specifications therefor in the same manner as other projects on the Interstate System, and

(2) the project shall conform to the standards adopted under subsection (b) of section 109 of this title.

(b) In determining the apportionment for any fiscal year under the provisions of subsection (b) (5) of section 104 of this title, any such project constructed by a State without the aid of Federal funds shall not be considered completed until an application under the provisions of this section with respect to such project has been approved by the Secretary.

Sec. 118. Availability of sums apportioned

(a) On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior Acts, such sums shall be available for expenditure under the provisions of this title.

(b) Such sums shall continue available for expenditure in that State for the appropriate Federal-aid system or part thereof for a period of two years after the close of the fiscal year for which such sums are authorized and any amounts so apportioned remaining unexpended at the end of such period shall lapse, except that any amount apportioned to the States for the Interstate System under subsection (b) (4) and (5) of section 104 of this title remaining unexpended at the end of the period during which it is available under this section shall lapse and shall immediately be reapportioned among the other States in accordance with the provisions of subsection (b) (5) of section 104 of this title. Such sums for any fiscal year shall be deemed to be expended if a sum equal to the

total of the sums apportioned to the State for such fiscal year and previous fiscal years is covered by formal project agreements providing for the expenditure of funds authorized by each Act which contains provisions authorizing the appropriation of funds for Federal-aid highways. Any Federal-aid highway funds released by the payment of the final voucher or by the modification of the formal project agreement shall be credited to the same class of funds, primary, secondary, urban, or interstate, previously apportioned to the State and be immediately available for expenditure.

(c) The total payments to any State shall not at any time during a current fiscal year exceed the total of all apportionments to such State in accordance with section 104 of this title for such fiscal year and all preceding fiscal years.

Sec. 119. See footnote.[33]

Sec. 120. Federal share payable

(a) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project, financed with primary, secondary, or urban funds, on the Federal-aid primary system and the Federal-aid secondary system shall not exceed 50 per centum of the cost of construction, except that in the case of any State containing nontaxable Indian lands, individual and tribal, and public domain lands (both reserved and unreserved) exclusive of national forests and national parks and monuments, exceeding 5 per centum of the total area of all lands therein, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State, is of its total area.[34, 35]

(b) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project, financed with interstate funds on the Interstate System, authorized to be appropriated prior to June 29, 1956, shall not exceed 60 per centum of the cost of construction, except that in the case of any State containing unappropriated and un-

[33] Repealed by sec. 21(d) (3) of Public Law 86-70, June 25, 1959 (73 Stat. 141).

[34] Amended by sec. 21(e) (4) of Public Law 86-70, June 25, 1959 (73 Stat. 141).

[35] Amended by sec. 3 of Public Law 89-657, July 14, 1960 (74 Stat. 522).

reserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State, is of its total area. The provisions of subsection (a) of this section shall apply to any project financed with funds authorized by the provisions of section 2 of the Federal-Aid Highway Act of 1952.

(c) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project on the Interstate System provided for by funds made available under the provisions of section 108(b) of the Federal-Aid Highway Act of 1956 shall be increased to 90 per centum of the total cost thereof, plus a percentage of the remaining 10 per centum of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area, except that such Federal share payable on any project in any State shall not exceed 95 per centum of the total cost of such project.

(d) The Federal share payable on account of any project for the elimination of hazards of railway-highway crossings, as more fully described and subject to the conditions and limitations set forth in section 130 of this title, may amount to 100 per centum of the cost of construction of such projects, except that not more than 50 per centum of the right-of-way and property damage costs, paid from public funds, on any such project, may be paid from sums apportioned in accordance with section 104 of this title: **Provided,** That not more than 10 per centum of all the sums apportioned for all the Federal-aid systems for any fiscal year in accordance with section 104 of this title shall be used under this subsection.

(e) The Secretary may rely on a statement from the Secretary of the Interior as to the area of the lands referred to in subsections (a) and (b) of this section. The Secretary of the Interior is authorized and directed to provide such statement annually.

(f) The Federal share payable on account of any repair or reconstruction provided for by funds made available under

section 125 of this title shall not exceed 50 per centum of the cost thereof: **Provided,** That, in the case of any State containing nontaxable Indian lands, individual and tribal, and public domain lands (both reserved and unreserved) exclusive of national forests and national parks and monuments exceeding 5 per centum of the total area of all lands therein, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State, is of its total area: **Provided further,** That the Federal share payable on account of any repair or reconstruction of forest highways, forest development roads and trails, park roads and trails, and Indian reservation roads may amount to 100 per centum of the cost thereof, whether or not such highways, roads, or trails are on any Federal-aid highway system. Any project agreement for which the final voucher has not been approved by the Secretary on or before the date of this Act may be modified to provide for the Federal share authorized herein.[36, 37]

(g) The Secretary is authorized to cooperate with the State highway departments and with the Department of the Interior in the construction of Federal-aid highways within Indian reservations and national parks and monuments under the jurisdiction of the Department of the Interior and to pay the amount assumed therefor from the funds apportioned in accordance with section 104 of this title to the State wherein the reservations and national parks and monuments are located.

(h) See footnote.[38]

Sec. 121. Payment to States for construction

(a) The Secretary may, in his discretion, from time to time as the work progresses, make payments to a State for costs of construction incurred by it on a project. These payments shall at no time exceed the Federal share of the costs of construction incurred to the date of the voucher covering such payment plus the Federal share of the value of the materials which have been stockpiled in the vicinity of such construction in conformity to plans and specifications for the project.

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[36] Amended by sec. 107(b) of Public Law 86-342, Sept. 21, 1959 (73) Stat. 611).

[37] Amended by Public Law 88-658, Oct. 13, 1964 (78 Stat. 1090).

[38] Repealed by sec. 21(d) (4) of Public Law 86-70, June 25, 1959 (73 Stat. 141).

(b) After completion of a project in accordance with the plans and specifications, and approval of the final voucher by the Secretary, a State shall be entitled to payment out of the appropriate sums apportioned to it of the unpaid balance of the Federal share payable on account of such project.

(c) No payment shall be made under this chapter, except for a project located on a Federal-aid system and covered by a project agreement. No final payment shall be made to a State for its costs of construction of a project until the completion of the construction has been approved by the Secretary following inspections pursuant to section 114(a) of this title.

(d) In making payments pursuant to this section, the Secretary shall be bound by the limitations with respect to the permissible amounts of such payments contained in sections 120 and 130 of this title. Payments for construction engineering on any project financed with Federal-aid primary, secondary, or urban funds shall not exceed 10 per centum of the Federal share of the cost of construction of such project after excluding from the cost of construction the costs of rights-of-way, preliminary engineering, and construction engineering: **Provided,** That such limitation shall be 15 per centum in any State with respect to which the Secretary finds such higher limitation to be necessary. For any project financed with interstate funds, such limitation shall be 10 per centum.[39]

(e) Such payments shall be made to such official or officials or depository as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State.

Sec. 122. Payment to States for bond retirement

Any State that shall use the proceeds of bonds issued by the State, county, city, or other political subdivision of the State for the construction of one or more projects on the Federal-aid primary or Interstate System, or extensions of any of the Federal-aid highway systems in urban areas, may claim payment of any portion of the sums apportioned to it for expenditure on such system to aid in the retirement of the principal of such bonds at their maturities, to the extent that the proceeds of such bonds have been actually expended in the construction of

[39] Amended by sec. 7(b) of Public Law 88-157, Oct. 24, 1963 (77 Stat. 276).

one or more of such projects. Such claim for payment may be made only when all of the provisions of this title have been complied with to the same extent and with the same effect as though payment were to be made to the State under section 121 of this title, instead of this section, and the Federal share payable shall not exceed the pro rata basis of payment authorized in section 120 of this title. This section shall not be construed as a commitment or obligation on the part of the United States to provide funds for the payment of the principal of any such bonds.

Sec. 123. Relocation of utility facilities

(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

(b) The term "utility," for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.

(c) The term "cost of relocation," for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

Sec. 124. Advances to States

If the Secretary shall determine that it is necessary for the expeditious completion of projects on any of the Federal-aid systems, including the Interstate System, he may advance to any State out of any existing appropriations the Federal share of the cost of construction thereof to enable the State highway department to make prompt payments for acquisition of rights-of-way, and for the construction as it progresses. The sums so advanced shall be deposited in a special revolving trust fund, by the State official authorized under the laws of the

State to receive Federal-aid highway funds, to be disbursed solely upon vouchers approved by the State highway department for rights-of-way which have been or are being acquired, and for construction which has been actually performed and approved by the Secretary pursuant to this chapter. Upon determination by the Secretary that any part of the funds advanced to any State under the provisions of this section are no longer required, the amount of the advance, which is determined to be in excess of current requirements of the State, shall be repaid upon his demand, and such repayments shall be returned to the credit of the appropriation from which the funds were advanced. Any sum advanced and not repaid on demand shall be deducted from sums due the State for the Federal pro rata share of the cost of construction of Federal-aid projects.

Sec. 132. Payments on Federal-aid projects undertaken by a Federal agency

Where a proposed Federal-aid project is to be undertaken by a Federal agency pursuant to an agreement between a State and such Federal agency and the State makes a deposit with or payment to such Federal agency as may be required in fulfillment of the State's obligation under such agreement for the work undertaken or to be undertaken by such Federal agency, the Secretary, upon execution of a project agreement with such State for the proposed Federal-aid project, may reimburse the State out of the appropriate appropriations the estimated Federal share under the provisions of this title of the State's obligations so deposited or paid by such State. Upon completion of such project and its acceptance by the Secretary, an adjustment shall be made in such Federal share payable on account of such project based on the final cost thereof. Any sums reimbursed to the State under this section which may be in excess of the Federal pro rata share under the provisions of this title of the State's share of the cost as set forth in the approved final voucher submitted by the State shall be recovered and credited to the same class of funds from which the Federal payment under this section was made.[48]

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[48] Amended by sec. 4(a) of Public Law 86-657, July 14, 1960 (74 Stat. 522).

Sec. 302. State highway department

(a) Any State desiring to avail itself of the provisions of this title shall have a State highway department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by this title. Among other things, the organization shall include a secondary road unit.

(b) The State highway department may arrange with a county or group of counties for competent highway engineering personnel suitably organized and equipped to the satisfaction of the State highway department, to supervise construction and maintenance on a county-unit or group-unit basis, for the construction of projects on the Federal-aid secondary system, financed with secondary funds, and for the maintenance thereof.

Sec. 303. Bureau organization

(a) The Bureau of Public Roads shall be in the Department of Commerce as a primary unit administered by the Federal Highway Administrator, appointed by the President by and with the advice and consent of the Senate. The Administrator shall perform such duties as the Secretary of Commerce may prescribe or as may be required by law. There shall be a Deputy Federal Highway Administrator, who shall be appointed by the Secretary and perform such duties as may be prescribed by the Federal Highway Administrator.[61, 62]

(b) The Secretary is authorized to employ such assistants, clerks, and other persons in the city of Washington and elsewhere, to be taken from the eligible lists of the Civil Service Commission, to rent buildings outside of the city of Washington, to purchase such supplies, material, equipment, office fixtures and apparatus, to advertise in the city of Washington for work to be performed in areas adjacent thereto, and to incur, and authorize the incurring of, such travel and other expenses as he may deem necessary for carrying out the functions under this title.

(c) The Secretary is authorized to procure temporary serv-

[61] Amended by sec. 1 of Public Law 87-392, Oct. 4, 1961 (75 Stat. 822).

[62] Amended by sec. 305(24) of Public Law 88-426, Aug. 14, 1964 (78 Stat. 400).

ices in accordance with the provisions of section 15 of the Act of August 2, 1946 (5 U.S.C. 55a), but at rates for individuals not in excess of $100 per diem.

Sec. 304. Participation by small business enterprises

It is declared to be in the national interest to encourage and develop the actual and potential capacity of small business and to utilize this important segment of our economy to the fullest practicable extent in construction of the Federal-aid highway systems, including the Interstate System. In order to carry out that intent and encourage full and free competition, the Secretary should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway program.

Sec. 311. Highway improvements strategically important to the national defense

Funds made available under subsection (a) of section 104 of this title may be used to pay the entire engineering costs of the surveys, plans, specifications, estimates, and supervision of construction of projects for such urgent improvements of highways strategically important from the standpoint of the national defense as may be undertaken on the order of the Secretary and as the result of request of the Secrtary of Defense or such other official as the President may designate. With the consent of a State, funds made available under subsection (b) of section of this title may be used to the extent deemed necessary and advisable by the Secretary to carry out the provisions of this section.

Sec. 312. Detail of Army, Navy, and Air Force officers

The Secretary of Defense, upon request of the Secretary, is authorized to make temporary details to the Bureau of Public Roads of officers of the Army, the Navy, and the Air Force, without additional compensation, for technical advice and for consultation regarding highway needs for the national defense. Travel and subsistence expenses of officers so detailed shall be paid from appropriations available to the Department of Commerce on the same basis as authorized by law and by regulations of the Department of Defense for such officers.

Sec. 315. Rules, regulations, and recommendations

Except as provided in sections 204(d), 205(a), 206(b), 207(b), and 208(c) of this title, the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State highway departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

APPENDIX C

VOL. IV. REGULATIONS, STANDARDS, AND STATEMENTS OF POLICY

ADMINISTRATION OF FEDERAL AID FOR HIGHWAYS

23 C.F.R., Ch. 1, Pt. 1

Part 1 of Chapter 1 of Title 23 of the Code of Federal Regulations is revised to read as follows:[1]

Sec.

1.1 Purpose.
1.2 Definitions.
1.3 Federal-State cooperation; Authority of State highway departments.
1.4 Coopration of governmental instrumentalities.
1.5 Information furnished by State highway departments.
1.6 Federal-aid highway systems.
1.7 Urban area boundaries.
1.8 Programs of proposed projects.
1.9 Limitation on Federal participation.
1.10 Surveys, plans, specifications and estimates.
1.11 Engineering services.
1.12 Authorizations to proceed with projects.
1.13 Changes in project work and cost.
1.14 Project agreements.
1.15 Construction contracts and force account work.
1.16 Licensing and qualification of contrators.
1.17 Health and safety.
1.18 Furnishing of materials.
1.19 Restrictions upon materials.
1.20 Surety bonds and insurance.
1.21 Subcontracting.
1.22 Patented or proprietary items.
1.23 Rights-of-way.
1.24 Labor and employment.
1.25 Railway-highway crossing projects.
1.26 Highway planning and research projects.
1.27 Maintenance.
1.28 Diversion of highway revenues.
1.29 Vehicle weight and width limitation.
1.30 Records and documents.
1.31 Payments.
1.32 Policies and procedures..

1 Published in the Federal Register, 25 F. R. 4162, May 11, 1960.

1.33 Conflicts of interest.
1.34 Secondary road plan.
1.35 Advertising.
1.36 Compliance with Federal laws and regulations.
1.37 Delegation of authority.
1.38 Application of regulations.

AUTHORITY: §§ 1.1 to 1.38 issued under sec. 315, 72 Stat. 915, 23 U.S.C. 315.

Sec. 1.1 Purpose

The purpose of the regulations in this part is to implement and carry out the provisions of Federal law relating to the administration of Federal aid for highways.

Sec. 1.2 Definitions

(a) Terms defined in 23 U.S.C. 101(a), shall have the same meaning where used in the regulations in this part, except as modified herein.

(b) The following terms where used in the regulations in this part shall have the following meaning:

Administrator. The Federal Highway Administrator.

Advertising Policy. The national policy relating to the regulation of outdoor advertising declared in title 23 U.S.C. 131.

Advertising Standards. The "National Standards for Regulation by States of Outdoor Advertising Signs, Displays and Devices Adjacent to the National System of Interstate and Defense Highways" promulgated by the Secretary (Part 20 of this chapter).

Commissioner. The Commissioner of Public Roads.

Federal laws. The provisions of title 23, United States Code, and all other Federal laws, heretofore or hereafter enacted, relating to Federal aid for highways.

Latest available Federal Census. The latest available Federal decennial census, except for the establishment of urban areas.

Project. An undertaking by a State highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways.

Secondary road plan. A plan for administration of Federal aid for highways on the Federal-aid secondary highway system pursuant to 23 U.S.C. 117.

Secretary. The Secretary of Commerce.

State. Any State of the United States, the District of Columbia and Puerto Rico.

Urban area. An area including and adjacent to a municipality or other urban place having a population of five thousand or more, as determined by the latest available published official Federal census, decennial or special, within boundaries to be fixed by a State highway department, subject to the approval of the Administrator.

Sec. 1.3. Federal-State cooperation; authority of State highway departments

The Administrator shall cooperate with the States, through their respective State highway departments, in the construction of Federal-aid highways. Each State highway department, maintained in conformity with 23 U.S.C. 302, shall be authorized, by the laws of the State, to make final decisions for the State in all matters relating to, and to enter into, on behalf of the State, all contracts and agreements for projects and to take such other actions on behalf of the State as may be necessary to comply with the Federal laws and the regulations in this part.

Sec. 1.4. Cooperation of governmental instrumentalities

The State highway department shall be responsible for any project to be undertaken with the cooperation of, or with funds provided by, any other governmental instrumentality.

Sec. 1.5. Information furnished by State highway departments

At the request of the Administrator the State highway department shall furnish to him such information as the Administrator shall deem desirable in administering the Federal-aid highway program.

Sec. 1.6 Federal-aid highway systems

(a) **Selection or designation.** To insure continuity in the direction of expenditures of available funds, system of Federal-aid highways are selected or designated by any State that desires to avail itself through its State highway department, of the benefits of Federal aid for highways. Upon approval by the Administrator of the selections or designations by a State highway department, such highways shall become portions of

the respective Federal-aid highway systems, and all Federal-aid apportionments shall be expanded thereon.

(b) **Revisions.** A State highway department may propose revisions, including additions, deletions or other changes, in the routes comprising the approved Federal-aid highway systems. Any such revision shall become effective only upon approval thereof by the Administrator upon a determination that such revision is in the public interest and consistent with Federal laws. There is no predetermined time limit for the submission of the full selection of the systems.

(c) **Selection considerations.** Each Federal-aid system shall be so selected or designated as to promote the general welfare and the national and civil defense and to become the pattern for a long-range program of highway development to serve the major classes of highway traffic broadly identified as (1) interstate or interregional; (2) city-to-city primary, either interstate or intrastate; (3) rural secondary or farm-to-market; and (4) intraurban. The conservation and development of natural resources, the advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system.

(d) **Identity.** The Federal-aid highway systems as now constituted and approved are identified as:

(1) The Interstate System, as described in 23 U.S.C. 103(d), comprised of highways of the highest importance to the nation;

(2) The Federal-aid primary system, as described in 23 U.S.C. 103(b), comprised of important city-to-city, interstate and intrastate highways, serving essentially through traffic; and

(3) The Federal-aid secondary system, as described in 23 U.S.C. 103(c), not to exceed in any State at one time a mileage that can be initially improved within a reasonable period of years and thereafter maintained with income expected to be available.

(e) **Integration.** The highways of the Federal-aid systems shall form integrated and connected networks in each State

and nationwide. The individual routes of Federal-aid systems that cross the boundary line between contiguous States are to connect at the boundary line, and except in unusual cases the identity of the Federal-aid system for any such route shall be the same in the States involved.

Sec. 1.7 Urban area boundaries

Boundaries of an urban area shall be submitted by the State highway department and be approved by the Administrator prior to the inclusion in a program of any project wholly or partly in such area involving funds authorized for and limited to urban areas.

Sec. 1.8 Programs of proposed projects

Each State highway department shall prepare and submit to the Administrator, for his approval, detailed programs of proposed projects in such form and supported by such information as the Administrator may require. The Administrator shall not authorize any State to proceed with any project, or part thereof, until the program which includes such project has been approved.

Sec. 1.9. Limitation on Federal participation

Federal-aid funds shall not participate in any cost which is not incurred in conformity with applicable Federal and State law, the regulations in this part, and policies and procedures prescribed by the Administrator. Federal funds shall not be paid on account of any cost incurred prior to authorization by the Administrator to the State highway department to proceed with the project or part thereof involving such cost.

Sec. 1.10. Surveys, plans, specifications, and estimates

(a) **Preparation.** Surveys, plans, specifications and estimates shall be prepared by or under the immediate direction of the State highway department and shall be of such content and form as prescribed by the Administrator.

(b) **Approval.** No project or part thereof for actual construction shall be advertised for contract nor work commenced by force account until plans, specifications, and estimates have been submitted to and approved by the Administrator and the State has been so notified.

Sec. 1.11 Engineering services

(a) **Federal participation.** Costs of engineering services performed by the State highway department or any instrumentality or entity referred to in paragraphs (b) and (c) of this section may be eligible for Federal participation only to the extent that such costs are directly attributable and properly allocable to specific projects. Expenditures for the establishment, maintenance, general administration, supervision, and other overhead of the State highway department, or other instrumentality or entity referred to in paragraphs (b) and (c) of this section shall not be eligible for Federal participation.

(b) **Government engineering organizations.** The State highway department may utilize, under its supervision, the services of well-qualified and suitably equipped engineering organizations of other governmental instrumentalities for making surveys, preparing plans, specifications and estimates, and for supervising the construction of any project.

(c) **Railroad and utility engineering organizations.** The State highway department may utilize, under its supervision, the services of well-qualified and suitably equipped engineering organizations of the affected railroad companies for railway-highway crossing projects and of the affected utility companies for projects involving utility installations.

(d) **Private engineering organizations.** Private engineering organizations may be utilized on projects in accordance with requirements prescribed by the Administrator.

(e) **Responsibility of the State highway department.** The State highway department is not relieved of its responsibilities under Federal law and the regulations in this part in the event it utilizes the services of any engineering organization under paragraphs (b), (c) or (d) of this section.

Sec. 1.12. Authorizations to proceed with projects

No work shall be undertaken on any Federal-aid project, nor shall any project be advertised for contract, prior to authorization thereof by the Administrator.

Sec. 1.13. Changes in project work and cost

Subsequent to authorization by the Administrator to proceed with a project or any undertaking thereunder, no change

shall be made which will increase the cost of the project to the Federal Government or alter the termini, character or scope of the work without prior authorization by the Administrator.

Sec. 1.14. Project agreements

Project agreements, and modifications thereof, shall be in forms satisfactory to the Administrator, evidencing acceptance by the State highway department of conditions to payment of Federal funds, as prescribed by Federal laws and the regulations in this part, and the amount of Federal funds obligated.

Sec. 1.15. Construction contracts and force account work

(a) **Competitive bidding.** Except as provided in paragraph (b) hereof or when the Administrator finds that because of unusual circumstances some other method is in the public interest, actual construction work shall be performed by contract awarded to the lowest responsible bidder. The State highway department shall assure opportunity for free, open and competitive bidding, including adequate publicity of the advertisements or calls for bids. The advertising or calling for bids and the award of contracts shall comply with procedures and requirements prescribed by the Administrator.

(b) **Force account work.** When the Administrator finds that it is in the public interest, construction work may be performed by force account pursuant to requirements and procedures prescribed by him. Before such finding is made, the State highway department shall determine that the organization to undertake the work is so staffed and equipped as to perform such work satisfactorily and economically.

Sec. 1.16 Licensing and qualification of contractors

With respect to Federal-aid projects, no procedure or requirement for prequalification, qualification or licensing of contractors shall be approved which, in the judgment of the Administrator, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor, whether resident or nonresident of the State wherein the work is to be performed. No contractor shall be required by law, regulation or practice to obtain a license before he may submit a bid or before his bid may be considered for award of a contract. This,

however, is not intended to preclude requirements for the licensing of a contractor upon or subsequent to the award of the contract if such requirements are consistent with competitive bidding. Prequalification of contractors may be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening of bids affords sufficient time to enable a bidder to obtain the required prequalification rating. Requirements for the prequalification, qualification or licensing of contractors, that operate to govern the amount of work that may be bid upon by or may be awarded to a contractor, shall be approved only if based upon a full and appropriate evaluation of the contractor's experience, personnel, equipment, financial resources, and performance record.

Sec. 1.17. Health and safety

Contracts for projects shall include provisions designed (a) to insure full compliance with all applicable Federal, State and local laws governing safety, health and sanitation, and (b) to require that the contractor shall provide all safeguards, safety devices and protective equipment and shall take any other actions reasonably necessary to protect the life and health of persons working at the site of the project and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

Sec. 1.18. Furnishing of materials

Contracts for projects shall require the contractor to furnish all materials incorporated in the work, except as otherwise authorized by the prior approval of the Administrator.

Sec. 1.19. Restrictions upon materials

No requirement shall be imposed and no procedure shall be enforced by any State in connection with a project which may operate (a) to require the use or provide a price differential in favor of articles or materials produced within the State, or otherwise to prohibit, restrict or discriminate against the use of articles or materials shipped from or prepared, made or produced in any State, territory or possession of the United States; or (b) to prohibit, restrict or otherwise discriminate against the use of articles or materials of foreign origin to any

greater extent than is permissible under policies of the Department of Commerce as evidenced by requirements and procedures prescribed by the Administrator to carry out such policies.

Sec. 1.20. Surety bonds and insurance

No procedure or requirement shall be imposed by any State in connection with any project which operates to restrict competitive bidding by discriminating against the purchase of a surety bond or insurance policy from any surety or insurer outside the State and authorized to do business in the State.[2]

Sec. 1.21. Subcontracting

(a) **Contractor's organization.** Contracts for projects shall require that the contractor perform with his own organization contract work amounting to not less than 50 percent of the total contract price. If any of the contract work requires highly specialized knowledge, craftmanship or equipment not ordinarily available in contracting organizations qualified to bid on the contract as a whole, such work may be designated in the advertised specification as "Speciality Items" and may be performed by subcontract. The cost of such "Specialty Items" may be deducted from the total contract price before computing the amount of work required to be performed by the contractor with his own organization.

(b) **Exception.** Upon the request of a State, the requireof this section may be modified by the Administrator for a project prior to or after the award of a contract, heretofore or hereafter made, to such extent as he may determine to be in the public interest.

Sec. 1.22. Patented or proprietary items

Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process, specifically set forth in the plans and specifications for a project, unless

(1) Such patented or proprietary item is purchased or obtained through competitive bidding with equally suitable unpatented items; or

[2] Amended March 23, 1963, 28 F.R. 2901.

(2) The State highway department certifies either that such patented or proprietary item is essential for synchronization with existing highway facilities, or that no equally suitable alternate exists; or

(3) Such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes.

Sec. 1.23. Rights-of-way

(a) **Interest to be acquired.** The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project.

(b) **Use for highway purposes.** Except as provided under paragraph (c) of this section, all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes. No project shall be accepted as complete until this requirement has been satisfied. The State highway departments shall be responsible for preserving such right-of-way free of all public and private installations, facilities or encroachments, except (1) those approved under paragraph (c) of this section; (2) those which the Administrator approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes and (3) informational sites established and maintained in accordance with section 1.35 of the regulations in this part.

(c) **Other use or occupancy.** Subject to 23 U.S.C. 111, the temporary or permanent occupancy or use of right-of-way, including air space, for nonhighway purposes and the reservation of subsurface mineral rights within the boundaries of the rights-of-way of Federal-aid highways, may be approved by the Administrator, if he determines that such occupancy, use or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon.

Sec. 1.24. Labor and employment

(a) **Convict labor.** No convict labor shall be employed and no materials manufactured or produced by convict labor shall be used in the construction of a project. No convict labor shall

be employed at the site of a project after the approval of the program including the project and prior to the completion of its construction.

(b) **Selection of labor.** No procedure or requirement shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a project.

(c) **Wage rates; Interstate system projects.** The advertisement or call for bids on any contract for the initial construction of a project on the Interstate System either shall include the minimum wage rates determined therefor by the Secretary of Labor or shall provide that such rates are set out in the advertised specifications, proposal or other contract document, and shall further specify that such rates are a part of the contract covering the project.

(d) **Wage rates; other Federal-aid projects.** Contracts for the construction of projects other than those for initial construction of the Interstate System shall require that laborers and mechanics employed on such construction shall be paid rates of wages not less than the minimum rates therefor set forth in the contract for such construction as predetermined under State law or, in the absence thereof, by the State highway department.

(e) **Construction by Federal agencies.** In those cases where construction work on Federal-aid highways is being performed by any Federal agency under its procedures and by Federal contract, the labor standards relating to direct Federal contracts shall be applicable.

(a) **Requirements for agreements or orders.** Before a project for the elimination of hazards at a railway-highway crossing shall be approved for construction with the aid of Federal funds, irrespective of the Federal share of the cost of such construction, either (1) an agreement shall have been entered into between the State highway department and the railroad concerned; or (2) an order authorizing the project shall have been issued by the State public utility commission or other agency or official having comparable powers. Such agreement or order shall contain provisions specifying responsibility for

and pertinent details concerning construction, maintenance, and railroad contributions relating to the project, which, subject to 23 United States Code, section 130, and other applicable Federal law, conform to, and are not inconsistent with, the policies, classifications of projects and procedures prescribed by the Administrator. In extraordinary cases, where the Administrator finds that the circumstances are such that requiring such agreement or order would not be in the best interests of the public, projects may be approved for construction with the aid of Federal funds without requiring such agreement or order prior to such approval, provided provisions satisfactory to the Administrator have been made with respect to construction, maintenance and railroad contributions relating to the project.

(b) **Applicability of State laws.** State laws pursuant to which contributions are imposed upon railroads for the elimination of hazards at railway-highway crossings shall be held not to apply to Federal-aid projects.

Sec. 1.26. Highway planning and research projects

(a) The funds programed for highway planning and research projects under 23 U.S.C. 307(c) (1) and (3) shall be administered as a single funds, but the identity of such funds, as Interstate, primary, secondary or urban, shall be preserved.

(b) The funds programed for highway planning and research projects under 23 U.S.C. 307(c) (2) shall be administered as a single fund.[3]

Sec. 1.27. Maintenance

The responsibility imposed upon the State highway department, pursuant to 23 U.S.C. 116, for the maintenance of projects shall be carried out in accordance with policies and procedures issued by the Administrator. The State highway department may provide for such maintenance by formal agreement with any adequately equipped county, municipality or other governmental instrumentality, but such agreement shall not relieve the State highway department of its responsibility for such maintenance.

[3] Amended Oct. 19, 1965, 30 F.R. 13255.

Sec. 1.28. Diversion of highway revenues

(a) **Reduction in apportionment.** If the Secretary shall take such action as he may deem necessary to comply with said provision of law by reducing the first Federal-aid apportionment of primary, secondary and urban funds made to the State after the date of such finding. In any such reduction, each of these funds shall be reduced in the same proportion.

(b) **Furnishing of information.** The Administrator may require any State to submit to him such information as he may deem necessary to assist the Secretary in carrying out the provisions of 23 U.S.C. 126 and paragraph (a) of this section.

Sec. 1.29. Vehicle weight and width limitation

When requested by the Administrator, each State shall certify to the Administrator, with such pertinent information as he may require, whether or not its laws and regulations conflict with the limitations of 23 U.S.C. 127 as to weight and width of vehicles which may lawfully use the Interstate System within the boundaries of that State.

Sec. 1.30. Records and documents

(a) **General.** Each State highway department shall maintain or cause to be maintained all records and documents relating to the undertaking, carrying out and maintaining of each project in such form and manner as will enable the State to make available to the Administrator such information and data as he may require and shall be retained for a period of not less than 3 years from the date of the final payment of Federal funds to the State with respect to the particular project.

(b) **Toll facilities.** If Federal funds participate in a project for the construction of a toll bridge, toll tunnel or approach to a toll facility, under 23 U.S.C. 129, the State highway department shall maintain or cause to be maintained, in addition to the records specified in paragraph (a) of this section, such financial and other records relating to the construction, acquisition, income, expenditures, maintenance and the operation of the facility as will enable the Administrator to determine compliance with the provisions of 23 U.S.C. 129. Such

records shall be retained until the facility shall have been operated on a free basis for a period of at least 3 years.

(c) **Availability for inspection.** Records and documents maintained under paragraphs (a) and (b) of this section shall be available at all reasonable times for inspection by any authorized representative of the Federal Government and copies thereof shall be furnished when requested.

Sec. 1.31. Payments

States may submit requests for payments of Federal funds claimed to be due on account of a project. Such requests shall be in the form of vouchers as prescribed by the Administrator, and shall be certified and accompanied with such supporting data as the Administrator may require. Such vouchers may be submitted from time to time as the work progresses and shall be submitted promptly after completition of the project to which the voucher pertains.

Sec. 1.32. Policies and procedures

The Administrator shall promulgate and require the observance of such policies and procedures, and may take such other action as he may deem necessary for carrying out the provisions and purposes of the Federal laws and the regulations in this part.

Sec. 1.33. Conflicts of interest

No official or employee of a State or any other governmental instrumentality who is authorized in his official capacity to negotiate, make, accept or approve, or to take part in negotiating, making, accepting or approving any contract or subcontract in connection with a project shall have, directly or indirectly, any financial or other personal interest in any such contract or subcontract. No engineer, attorney, appraiser, inspector or other person performing services for a State or a governmental instrumentality in connection with a project shall have, directly or indirectly, a financial or other personal interest, other than his employment or retention by a State or other governmental instrumentality, in any contract or subcontract in connection with such project. No officer or employee of such person retained by a State or other governmental instrumentality shall have, directly or indirectly, any

financial or other personal interest in any real property acquired for a project unless such interest is openly disclosed upon the public records of the State highway department and of such other governmental instrumentality, and such officer, employee or person has not participated in such acquisition for and in behalf of the State. It shall be the responsibility of the State to enforce the requirements of this section.

Sec. 1.34. Secondary road plan

The approval by the Administrator of a State's certified statement of its secondary road plan, pursuant to 23 U.S.C. 117 will remain in effect for such time as the Administrator in his discretion may determine. Projects undertaken pursuant to such approved certified statement shall not be subject to the following sections of the regulations in this part: 1.10; 1.15; 1.16; 1.18; 1.19; 1.20; 1.21; 1.22; 1.24(b), (c), (d), and (e).

Sec. 1.35. Advertising

(a) **Agreements.** Any agreement entered into pursuant to the provisions of 23 U.S.C. 131 shall provide for the control or regulation of outdoor advertising, consistent with the Advertising Standards and Advertising Policy, in areas adjacent to the entire mileage of the Interstate Systems within that State, except such segments as may be excluded from application of such Standards and Policy by 23 U.S.C. 131. Such agreements may be modified, amended or supplemented as the Administrator may determine is necessary.

(b) **Informational sites.** Any such agreement for the control of advertising may provide for establishing publicly owned informational sites, whether publicly or privately operated, within the limits of or adjacent to the right-of-way of the Interstate System on condition that no such site shall be established or maintained except at locations and in accordance with plans, in furtherance of the Advertising Policy and consistent with the Advertising Standards, submitted to and approved by the Administrator.

(c) **Acquisition of advertising rights.** Federal funds may participate in the cost of acquiring rights to advertise or to regulate advertising only if the purpose of such acquisition is to accomplish the objectives stated in 23 U.S.C. 131. Projects for the acquisition of advertising rights shall embrace a seg-

ment of the highway of sufficient length to promote the objectives of the Advertising Policy. Within the limits of any such segment, provision shall be made for acquiring all of the advertising rights on both sides of the highway necessary to effectuate the Advertising Policy and Advertising Standards. No advertising right in the acquisition of which Federal funds participated shall be disposed of without the prior approval of the Administrator.

Sec. 1.36. Compliance with Federal laws and regulations

If the Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.

Sec. 1.37. Delegation of authority

The Administrator has been delegated authority to perform the functions vested in the Secretary under Federal law, except the apportionment of Federal-aid funds among the States. The Secretary has reserved to himself the function of issuing or revising regulations.

The Administrator is authorized to redelegate any power or authority conferred upon him to the Commissioner or to any other official or employee of the Bureau of Public Roads as in his judgment will result in efficiency and economy in the effectuation of the purposes of Federal law and the regulations in this part. Any redelegation by the Administrator may include the power to make successive redelegations of authority to the extent deemed desirable by him. Delegations made under regulations heretofor in effect shall continue in full force and effect until modified or revoked.

Sec. 1.38. Application of regulations

The regulations in this part shall take effect upon publication in the Federal Register and shall supersede all regula-

tions heretofore in effect for carrying out the provisions of Federal laws.

Dated May 5, 1960.
Recommended:
(SEAL)

B. D. TALLAMY,
Federal Highway Administrator.

Issued:

FREDERICK H. MUELLER,
Secretary of Commerce.

(F. R. Doc. 60-4226; Filed, May 10, 1960; 8:48 a.m.)

Effective May 11, 1960

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1390

D. R. SMALLEY & SONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-5a) is reported at 372 F. 2d 505.

JURISDICTION

The decision of the Court of Claims was entered on February 17, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

Whether a firm which has contracted with the State of Ohio to construct Federal-Aid highways may recover from the United States for alleged breach or inaction by the State under that contract.

STATUTES INVOLVED

28 U.S.C. 1491 provides in pertinent part as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The provisions of the Federal-Aid Highways Act, 23 U.S.C. 101 *et seq.*, are set forth in Appendix B to the petition (pp. 6a-35a).

STATEMENT

Petitioner, an Ohio construction firm, sued to recover damages allegedly incurred in connection with six contracts awarded by the Ohio Highway Department for the building of Federal-Aid highways. On two of the contracts, petitioner was principal contractor; on the other four, it was a subcontractor. Dissatisfied with an award of $195,690 by the Ohio Sundry Claims Board, petitioner brought suit against

the United States for $6,000,000 in the Court of Claims, although all its (and its prime contractor's) contracts were with the State of Ohio (Pet. App. 1a-2a). The action was dismissed by the Court of Claims for failure to state a claim on which recovery against the government could be based (Pet. App. 5a).

ARGUMENT

Since the United States is not a party to any of petitioner's contracts, and there is no congressional enactment permitting suits to be brought against the United States by contractors under the Federal-Aid Highways program, 23 U.S.C. 101 *et seq.*, the Court of Claims correctly dismissed petitioner's suit. The decision below is in accord with the only prior decision on the point, *Public Water Supply Dist. No. 6* v. *United States*, 66 F. Supp. 66 (W.D. Mo.), and there is no occasion for further review.[1]

Petitioner contends that it has a contract with the United States because, it alleges, the State of Ohio, in making contracts with it, was acting as an "agent" for the United States. Petitioner observes that under the Federal-Aid Highways Act the United States reimburses the States for 90 percent of their expenditures (23 U.S.C. 120(c)); that the Bureau of Public

[1] The paucity of suits by Federal-Aid Highway contractors against the United States, in the 50 years since the inception of the program (see Federal-Aid Road Act of 1916, 39 Stat. 355), is a strong indication that the thousands of contractors under the program have recognized the obvious fact that they have no contract with the United States.

Roads approves such contracts and inspects the actual construction (23 U.S.C. 105, 106, 112); and that the United States, as well as the contracting State, receives a benefit from the contract. It does not follow, however, that petitioner has a contract with the United States or a cause of action within the jurisdiction of the Court of Claims.[2]

Petitioner's assertion that the legal relationship[3] between the federal and State governments, with regard to the Federal-Aid Highways program, is one of agency is plainly erroneous. See *Eden Memorial Park Ass'n* v. *United States*, 300 F. 2d 432, 439 (C.A. 9).

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[2] The Court of Claims could, and did, as its opinion indicates (Pet. App. 2a-5a), take jurisdiction for the limited purpose of determining *whether* petitioner stated any claim based upon a contract, a federal statute, or the Constitution, for which relief could be granted. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246; cf. *Bell* v. *Hood*, 327 U.S. 678. The court below properly determined that the allegations of the complaint completely failed to state any proper claim against the United States.

[3] The status of the various parties under the Federal-Aid Highways Act and the contracts entered into pursuant to that Act, is a legal question which the Court of Claims properly decided on motion for summary judgment. Petitioner's contention that the court below erred in so proceeding (Pet. 15-17) is thus without merit.

In addition to the statutory provisions noted above, petitioner also appears to rely upon the provision in 23 U.S.C. 106(a) that the approval of a project by the Secretary of Commerce "shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." But this provision is of no assistance to petitioner, for it is clear that the contractual obligation referred to is one running to the States, in return for their reciprocal obligations, and not to private contractors (*e.g.*, 23 U.S.C. 114, 116).

The grants-in-aid under the Federal-Aid Highways program

> * * * are designed to encourage states to construct their own highways and * * * the primary function of the Bureau of Public Roads, in approving plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted.

Mahler v. *United States*, 306 F. 2d 713, 716 (C.A. 3), certiorari denied, 371 U.S. 923. As pointed out in *Mahler*, 306 F. 2d at 716-717, the States in awarding construction contracts under this program act on their own behalf; they "remain responsible for supervision of construction and for the maintenance of the highways after completion" (23 U.S.C. 114, 116), and "are at all times the owners of the roads and are primarily responsible for their operation."[4] Under the project agreements between the United States and Ohio, the federal government "did not, in any respect, assume any obligation to [the] contractors or create any liability on the United States Government for any work performed by them in conformity with their contracts with the [State Highway Commission]." *Public Water Supply Dist. No. 6* v. *United States*, *supra*, 66 F. Supp. at 70-71.

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[4] See also S. Rep. No. 1965, 84th Cong., 2d Sess., p. 4 (1956):

> The committee emphasizes that the program authorized herein is not one by which the Federal Government will construct highways, but a Federal-aid program within the framework of existing laws, rules, and procedures.

Plainly there was no express contract between the United States and petitioner, and no basis for implying one.[5] The approval of such contracts by the Bureau of Public Roads, and its inspection of the actual construction, serve one purpose—to ensure "that federal appropriations are being utilized properly and efficiently by the respective states and are not being

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[5] An "implied" contract which will sustain a suit against the United States must be one implied in fact, not in law. *E.g., Merritt* v. *United States*, 267 U.S. 338, 341. Petitioner failed to allege any facts from which it can be implied that the United States intended to contract with it. Its petition in the Court of Claims simply alleged (p. 8) that there was a contract implied in fact by virtue of the provisions of Title 23 of the United States Code; it suggested no other basis for implying a contract. Petitioner now asserts (Pet. 15), for the first time, that "if given the opportunity" it would have pointed out to the Court of Claims "specific times, places and the employees, officers and agents who have directly dealt with the Petitioner involving the claims in question," and that it was unable to make "certain allegations" (not specified) "because the facts are possessed" by government employees. Petitioner never suggested to the Court of Claims, in its petition and brief filed in that court, that it relied on anything other than the provisions of the Federal-Aid Highways Act for its contention that it had an implied contract with the United States. If petitioner did intend to rely on facts not alleged in its petition in the Court of Claims, it had not only the "opportunity" but the duty to state such facts in affidavits, in opposition to the government's motion for summary judgment. Rule 56(e), F. R. Civ. P.; Ct. Cl. Rule 64 (f). And petitioner's implication (Pet. 15) that there might exist some factual information of an unspecified nature supporting its contention, within the control of government agents, is frivolous. If there had been direct dealings between petitioner and government employees, petitioner would have equal access to that information.

wasted." *Mahler* v. *United States*, *supra*, 306 F. 2d at 716. Such provisions for approval of contracts and inspection of work performed under them do not make the United States a contracting party. For example, a subcontractor even under a standard government contract cannot sue the government, when he himself has not contracted with the United States. *United States* v. *Blair*, 321 U.S. 730, 737; cf. *Severin* v. *United States*, 99 Ct. Cl. 435, certiorari denied, 322 U.S. 733; *Beaconwear Clothing Co.* v. *United States*, 355 F. 2d 583, 590 (Ct. Cl.).

Petitioner's contention (Pet. 14-15) that there has been a "taking" of its property by the United States fails for much the same reasons. The allegations of its petition in the Court of Claims specifying the actions which it apparently contends constitute a "taking" of its property (contained in Paragraph 8 of that petition) without exception relate to actions of the State of Ohio.[6] There is no allegation that the federal government has interfered with the performance of petitioner's contracts with the State of Ohio or its prime contractor, or indeed that it has done anything more than perform the ordinary functions of approval of contracts, inspection, and reimbursement called for by the Federal-Aid Highways Act. Petitioner's "taking" argument is thus simply a reassertion of its erroneous theory that the United States may be sued

[6] See Pet. App. 2a-3a for a description of the actions alleged by petitioner to entail a "taking" in the Fifth Amendment sense. See also Pet. App. 5a, where the court below rejected this argument.

for the actions of the States in connection with the Federal-Aid highway program.[7]

Finally, petitioner urges (Pet. 11-13) that the Court of Claims had jurisdiction under 28 U.S.C. 1491 to render a judgment for it because its claim is founded on an Act of Congress or a regulation of an executive department. It is said that the provisions of the Federal-Aid Highways Act, 23 U.S.C. 101 *et seq.*, and the regulations promulgated thereunder, 23 C.F.R. 1.1 *et seq.*, are "ambiguous" as to whether Congress intended to permit parties having contracts with the States to sue the United States, and that the Court of Claims should have held an evidentiary hearing to resolve this ambiguity. However, the Federal-Aid Highways Act is not unclear on this point, and no need exists to take evidence in order to construe the statute. Congress has conspicuously omitted to provide for such contractors' suits against the United States. Petitioner points to no provision of the Federal-Aid Highways Act from which

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[7] For the United States to be liable for a constitutional "taking" of property, an action *by the government* involving a direct interference with, or disturbance of, *property* rights must be shown. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U.S. 445. Petitioner has not alleged such an action by the government, nor even an action by the State of Ohio constituting an interference with its property rights. It is evident from the factual allegations of the petition in the Court of Claims (as contrasted to its conclusory legal assertions) that the gist of the claim is an ordinary action in contract, for delays, etc., allegedly caused by one of the contracting parties, the State of Ohio. Cf. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588.

it can even remotely be implied that Congress meant to confer on contractors the right to maintain such suits. In point of fact, there simply is no such provision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys.

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